

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 17 2 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

JAMES A. KAY, JR.)

Licensee of one hundred sixty)
four Part 90 licenses in the)
Los Angeles, California area)

PR DOCKET NO. 94-147
WT DOCKET NO. 94-147

DOCKET FILE COPY ORIGINAL

To: Administrative Law Judge Richard L. Sippel

MOTION FOR MODIFICATION OR CORRECTION OF ORDER

James A. Kay, Jr. (Kay), by his attorneys, respectfully requests that Administrative Law Judge (the Judge) modify or correct his Order dated December 22, 1994, in the above-captioned matter. In support of his position, Kay shows the following.

In the Order, the Judge stated that "the burden of proceeding and the burden of proof have been assigned to the Wireless Telecommunications Bureau". However, review of the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture (OSC) clearly show that the Commission did not name the Wireless Telecommunications Bureau as a party to the instant proceeding. Rather, the OSC "ORDERED that the Chief, Private Radio Bureau SHALL BE a party to the proceeding," OSC at para. 13.

Review of the delegation of authority made to the Office of Administrative Law Judges made by the Commission's Rules does not disclose a delegation of authority to add or to

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substitute parties. Section 1.221(d) of the Commission's Rules, 47 C.F.R. §1.221(d), reserves to the Commission, on its own motion, the addition of parties to a hearing proceeding. Kay recognizes that there is some Commission precedent for the position that an Administrative Law Judge has the authority to add a party to a proceeding, however, Kay respectfully submits that any such holding is contradictory to the reservation of authority to the Commission, itself, found at Rule Section 1.221(d).

While the purported Deputy Chief, Wireless Telecommunications Bureau, attempted by means of a purported Erratum released December 23, 1994, subsequent to the release of the Judge's Order, to revise the OSC to designate the Chief, Wireless Telecommunications Bureau, as a party to the proceeding, the Wireless Telecommunications Bureau has not been delegated the authority either to add or substitute parties to a hearing proceeding, or to issue a correction to a Commission action.¹ Accordingly, the document released by the Deputy Chief was ineffective to designate the Wireless Telecommunications Bureau as a party to the instant proceeding.

Review of the Federal Register and of the Commission's daily releases of actions taken finds no instance in which the Commission has ever given public notice, as that term is defined by Section 1.4 of the Commission's Rules, 47 C.F.R. §1.4, of the delegation of any authority, whatsoever, to a Wireless Telecommunications Bureau. Since the purported Wireless

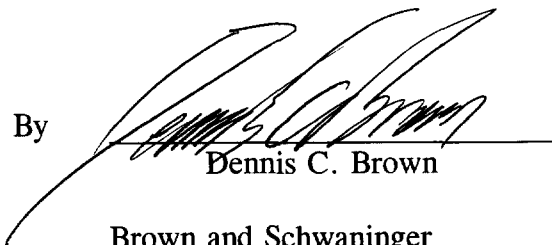
¹ Separately, Kay has filed with the Commission an Application for Review of the Deputy Chief's purported action, a copy of which is attached hereto for the Judge's convenience.

Telecommunications Bureau has not been delegated authority to take any action on behalf of the Commission, the Wireless Telecommunications Bureau would have no power to carry the Commission's burden of proceeding and burden of proof. Therefore, assignment by the Judge of the Wireless Telecommunications Bureau to carry the Commission's burdens would deprive the Commission of the ability to present its position.

Conclusion

For all the foregoing reasons, the Judge should modify or correct his Order to correspond with the OSC and should name the Chief, Private Radio Bureau, as the party charged with carrying the burden of proceeding and the burden of proof.

Respectfully submitted,
JAMES A. KAY, JR.

By 
Dennis C. Brown

Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

Dated: January 12, 1995

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Washington, D.C. 20554

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To: The Commission

APPLICATION FOR REVIEW

James A. Kay, Jr. (Kay), by his attorneys, respectfully requests that the Commission review¹ the action of the Deputy Chief (the Deputy Chief), Wireless Telecommunications Bureau, released December 23, 1994, in the above-captioned matter. In support of his position, Kay shows the following.

Issues Presented For Review

1) Whether the Deputy Chief engaged in an *ultra vires* act in releasing his Erratum in the above captioned matter.

¹ Since the Commission has never given public notice of the establishment of a Wireless Telecommunications Bureau, Kay cannot reasonably file a petition for reconsideration with the chief of that purported bureau. Accordingly, his only reasonable route of appeal appears to be by way of requesting review by the Commission of the above captioned action.

2) Whether the Deputy Chief violated Section 1.221 of the Commission's Rules in naming an additional party to a proceeding designated for hearing.

Factors Warranting Commission Consideration

The action was in conflict with statute and regulation, involved an erroneous finding as to an important or material question of fact, and involved a prejudicial procedural error.

Relief Requested

The Commission should set aside and reverse, withdraw, or strike the Deputy Chief's action.

Argument

Section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §155(c)(1), provides that the Commission "may, by published rule or order, delegate any of its functions" However, the Commission has never given any public notice, whatsoever, of the delegation of any authority, whatsoever, to a Wireless Telecommunications Bureau. Accordingly, the Deputy Chief of the Wireless Telecommunications Bureau had no authority to take any action in the above captioned matter. Because the action was not supported by any delegation of authority, the action should be set aside and reversed, withdrawn, or stricken.

While the Commission had delegated some authority to the Chief of the Private Radio Bureau to make editorial corrections to actions taken by the Commission, the action taken in the above captioned matter purporting to add the Chief, Wireless Telecommunications Bureau, to the above captioned proceeding was beyond any authority ever delegated by the Commission. Section 1.221(d) of the Commission's Rules, 47 C.F.R. §1.221(d), provides that "the Commission will on its own motion name as parties to the hearing any person found to be a party in interest". The Commission has not delegated authority to any person, panel, board, bureau, or other organizational unit to act under Rule 1.221(d) by naming persons as parties to hearings.

Although Section 1.223 of the Commission's Rules provides for the intervention of a party to a hearing in some types of cases, the above captioned matter is not of the type covered by Rule 1.223. No other Commission Rule provides any authority for a person desiring to become a party to hearing of the nature of the above captioned matter either to request addition as a party or to thrust itself into the proceeding as an intervenor on its own motion. Accordingly, the Deputy Chief's unilateral effort to have the Wireless Telecommunications Bureau intervene, made in the guise of an erratum, was without any lawful authority and was directly in contravention of Rule 1.223's reservation of authority by the Commission, itself.

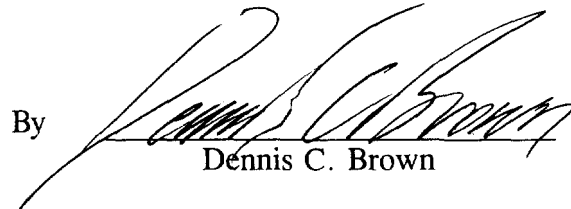
In numbered paragraph two of his Erratum, the Deputy Chief purported to amend paragraph 11 of the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture (OSC). However, careful review of the Erratum and the OSC shows

that there is no difference between the original and amended texts. Since the amendment which the Erratum purported to effect made no change in the OSC, the Deputy Chief's action was based on an erroneous finding as to an important or material question of fact.

Conclusion

The Deputy Chief's action was in conflict with statute and regulation, involved an erroneous finding as to an important or material question of fact, and involved a prejudicial procedural error. Therefore, the Commission should set the action aside and reverse, withdraw, or strike it.

Respectfully submitted,
JAMES A. KAY, JR.

By 
Dennis C. Brown

Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

Dated: January 12, 1995

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JAMES A. KAY, JR.)	
)	WT Docket No. 94-147
Licensee of one hundred)	
sixty four Part 90 licenses)	
in the Los Angeles, California area.)	

ERRATUM

Released: December 23, 1994

The Commission issued an Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture adopted December 9, 1994 and released on December 13, 1994 (FCC 94-315). The order is hereby amended as follows:

- 1) Docket Number changed to WT Docket No. 94-147.
- 2) The first sentence in Paragraph 11 is amended to read as follows:

IT IS FURTHER ORDERED that pursuant to Sections 312(b) and (c) of the Act Kay is directed to show cause why he should not be ordered to cease and desist from failing to operate his Private Land Mobile Radio licenses substantially as set forth in the licenses...

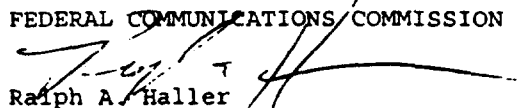
- 3) Paragraph 13 is amended to read as follows:

IT IS FURTHER ORDERED that the Chief, Wireless Telecommunications Bureau SHALL BE a party to the proceeding.

- 4) The first sentence of Paragraph 14 is amended to read as follows:

IT IS FURTHER ORDERED, that to avail himself of the opportunity to be heard pursuant to Section 1.91(c) of the Commission's rules,¹³ Kay, in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, a written appearance stating that he will appear at the hearing and present evidence on the matters specified in the Order.

FEDERAL COMMUNICATIONS COMMISSION

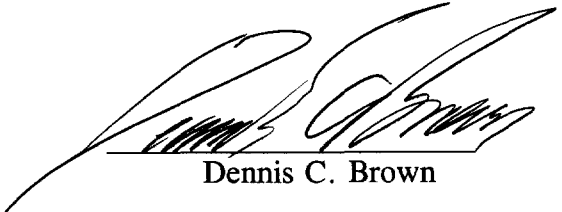

Ralph A. Haller
Deputy Chief
Wireless Telecommunications Bureau

CERTIFICATE OF SERVICE

I hereby certify that on this twelfth day of January, 1995, I served a copy of the foregoing Motion for Modification or Correction of Order on each of the following persons by placing a copy in the United States Mail, first-class postage prepaid:

Mr. Ralph A. Haller
Federal Communications Commission
Room 5002, Mail Stop 1700
2025 M Street, N.W.
Washington, D.C. 20554

Regina M. Keeney
Federal Communications Commission
Room 5002, Mail Stop 1700
2025 M Street, N.W.
Washington, D.C. 20554



Dennis C. Brown